SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 15 1969
JOHN F. DAVIS, CLERK

No. 1159

In the Supreme Court of the United States

OCTOBER TERM, 1968

MILTON W. LEWIS and LEE ROY SOHN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES A. BELLOWS
10 S. La Salle Street
Chicago, Illinois 60603
Attorney for Petitioners

HARRY J. BUSCH
JASON E. BELLOWS
SHERMAN C. MAGIDSON
On the Brief.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision and Rule Involved 3

Statement 3

Reasons for granting the Writ 9

1. Denial of Defendant Pace's motions to inspect the minutes of his testimony before the grand jury deprived these Petitioners of a potential witness in their behalf 9

2. Petitioners were denied the right to a speedy trial guaranteed them by the Sixth Amendment to the Constitution 14

Conclusion 17

AUTHORITIES CITED

Cases

Bruton v. United States, ... U.S. ....., 88 S.Ct. 1620.... 14

Dennis v. United States, 384 U.S. 855 .....11, 12, 16

Frankel v. Woodrough, 8th Cir. 1925, 7 F.2d 796.... 15

Huizar v. United States, 5th Cir. 1965, 339 F.2d 173.... 14

Nelson v. United States, D.C. Cir. 1953, 208 F.2d 504.... 12

Takahashi v. United States, 9th Cir. 1944, 143 F.2d 118 12

PAGE

United States v. Amabile, 7th Cir. 1968, 395 F.2d 47....10, 11

United States v. Echeles, 7th Cir. 1965, 352 F.2d 892.... 13

United States v. Ewell, 383 U.S. 116 15

United States v. Federman, S.D.N.Y. 1967, 41 F.R.D. 339 10

United States v. Galgano, 2nd Cir. 1960, 281 F.2d 908 14

United States v. Gleason, S.D.N.Y. 1966, 259 F. Supp. 282 10

United States v. Harris, et al., 7th Cir. 1967, 388 F.2d 373 12

United States v. Kageyama, D.C. Ha., 252 F.Supp. 284 10

United States v. Thompson, 7th Cir. 1950, 113 F.2d 643 12

United States v. Youngblood, 2nd Cir. 1967, 379 F.2d 365 11

Walsh v. United States, 1st Cir. 1967, 371 F.2d 436.... 10

Constitutional Provisions, Statutes and Rules

Sixth Amendment to the Constitution 3, 14, 15
Rule 7(c), Fed.R.Crim.Pro., 18 U.S.C.A. 14
Rule 16 (a)(3), Fed.R.Crim.Pro., 18 U.S.C.A. 3, 9, 10, 11
Rule 48, Fed.R.Crim.Pro., 18 U.S.C.A. 3, 15

Miscellaneous

Title 18, U.S.C.A., 1967 Cumulative Annual Pocket Part, Rule 16 .....9, 10

American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, §§ 2.2(a), 2.3(f) 17

In the Supreme Court of the United States

OCTOBER TERM, 1968

NO.

MILTON W. LEWIS and LEE ROY SOHN,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on January 29, 1969.

OPINION BELOW

The decision of the Court of Appeals (not yet reported) is reprinted as Appendix A, *infra.*

JURISDICTION

The Judgment of the Court of Appeals (Appendix B, *infra*) was entered on January 29, 1969. A timely Petition for Rehearing was denied on February 14, 1969 (Appendix C, *infra*).

QUESTIONS PRESENTED

1. Whether Petitioners were prejudiced by the refusal of the trial court to grant a codefendant's motion, pursuant to Rule 16(a)(3), Federal Rules of Criminal Procedure, for production of his testimony before the July 1965 Grand Jury for the Northern District of Illinois, where the codefendant was tried jointly with Petitioners in February 1967, failed or refused to testify because of the lack of the transcript of his prior testimony, and was the only defendant accused of participating in four of the ten transactions which comprised the Government's case against all defendants.

2. Whether Petitioners were denied their Constitutional right to a speedy trial, where information concerning their alleged offense first came to the attention of the Government in October, 1963, the matter was presented to a grand jury, and an indictment was returned in July, 1965, on which no steps were taken to bring Petitioners to trial; thereafter a second indictment, identical in all respects except that it recited the section of Title 18 allegedly violated, was returned on August 30, 1966; and, whether under these circumstances, the fact that the second indictment was returned within the period of the applicable statute of limitation excuses the Government's delay in bringing Petitioners to trial following the first indictment when its investigation had been completed.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * * *

Rule 16(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

> Rule 16. Discovery and Inspection
> (a) Defendant's Statements: Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant * * * (3) recorded testimony of the defendant before a grand jury.

Rule 48 of the Federal Rules of Criminal Procedure provides in pertinent part:

> Rule 48. Dismissal
> * * *
> (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

Petitioners together with Jerry Pace were indicted by the United States Grand Jury for the crimes of conspiracy and making and presenting a false and fraudulent paper and declaration.[1] Count One of the six-count indictment

---

[1]The indictment charged that the substantive offenses were in violation of Title 18, Section 289. (App. 8-11) Petitioners' claimed that this section was inapplicable, but conceded that the indictment stated an offense under Section 1001. (See, App. A, *infra*, pp. 2-3).

charged that the defendants, together with three unindicted co-conspirators, the Milroy Realty Company (owned and operated by Petitioners), Hill's Reports, Inc., and Dominic C. Pace, conspired to defraud the United States by presenting false and fraudulent credit statements and credit reports of prospective purchasers of homes offered for sale by the Veterans Administration. Eleven overt acts in furtherance of the conspiracy were charged. (App. 5-8) The remaining five counts charged the Petitioners and Pace[2] with substantive offenses of submitting specific false credit statements of various prospective purchasers. (App. 8-11) Following verdicts of guilty, Sohn and Lewis were sentenced to one year in custody of the Attorney General and to pay fines of $7,500 and $5,000, respectively. (App. 3) Pace, sentenced to probation with the first thirty days to be served in a jail-type institution, did not appeal.

Evidence introduced on behalf of the Government showed that in May or June of 1962 Petitioner Sohn, accompanied by Petitioner Lewis, went to the offices of Hill's Reports, Inc., in Chicago and there had a conversation with Mr. Edward Harner, an employee of Hill's. (App. 27) Sohn and Lewis operated Milroy Realty Company, which, among other interests, was a sales broker and property management broker for Veterans Administration (VA) housing. (App. 193, 195) The Company employed the defendant Jerry Pace and the unindicted co-conspirator Dominic Pace as salesmen. (App. 204, 208)

---

[2] Both Petitioners were charged in Count Two; Sohn alone was charged in Count Three; Sohn and Pace were charged in Count Four; Lewis and Pace were charged in Counts Five and Six. (App. 8-11) The jury returned general verdicts of guilty as to all defendants. (App. 2) The Court of Appeals reversed the verdicts against Lewis on Counts Five and Six. (App. A, *infra*, p. 8).

In the conversation with Harner, Sohn asked if Hill's could expedite credit and mortgage reports on those purchasers of VA housing whom Milroy proposed. Harner said Hill's would do everything in its power to comply with this request. Sohn said he would call the information in to Hill's and Harner could take his word that the given credit references had been checked; all Hill's would have to do was to see that the information was typed up and sent back to Milroy. Harner asked Sohn if this were all right, and Sohn assured him it was. Lewis nodded, implying that whatever Sohn said was all right, but he did not otherwise speak during the conversation. (App. 28) Sohn also told Harner that he had made a special arrangement with the VA and that it was perfectly all right to send the reports back without further investigation. (App. 28)

Following this conversation Sohn, or another person associated with Milroy, would call in the general background of persons seeking credit and their credit references. Hill's without making a further investigation, filled in these details in their credit report and sent them back to Milroy. This was not Hill's ordinary procedure, although they charged Milroy the same as they would have had an ordinary investigation taken place. (App. 31) Although Harner could not recall any particular case in which Sohn called in such information, he recalled asking, almost every time that Sohn did call, if he were sure that the procedure was all right. Sohn assured him it was. (App. 31)

Sohn never asked Harner to give false information. He said he wanted the reports expedited because his company was losing sales to another broker who was able to obtain the credit reports within 24 hours. After the in-

formation was called in, Hill's had 24 hours in which to verify it. (App. 36) Although Hill's had a reasonably complete set of records in its offices with which to check applicants and although the ordinary investigation could have been completed in this time (App. 41), they did not do so. (App. 36)

Harner was interviewed by agents from the VA sometime in 1963. (App. 35) Thereafter, Sohn asked Harner to prepare a letter to the VA explaining the circumstances under which Hill's made fast reports to him. Harner prepared such a letter on December 28, 1963. In it he stated: "We were not induced by Milroy Realty Company or anyone else to give an inaccurate credit report. We only arranged with Milroy Realty Company for fast service based on information given to our reporter." He also said: "We believe there is a complete misunderstanding regarding the arrangements of Milroy. We furnished conventional types of reports to Milroy Realty based on said information but did not check local reporting bureaus as we were asking for extremely fast service and this is not possible where you would have to check other credit information." (App. 37, 38) What Hill's did not check were records not contained in its own files. (App. 38)

On comparison of the credit statements submitted by Milroy with the Hill's reports, the VA found a similarity between the two. (App. 178)

In addition, the Government produced evidence from ten purchasers concerning the manner in which their credit statements had been taken and prepared by the defendants, or some of them. The evidence received in support of Count Two (and overt act 2) is illustrative.

Count Two charged that, for the purpose of consummating the sale of real estate owned by the VA to Theodore R. Gardner, Appellants Lewis and Sohn "knowingly and wilfully" made and presented a "false and fraudulent" Credit Statement and Offer of Prospective Purchaser signed by Gardner wherein it was stated that Gardner had no "obligations," which statement the defendants knew was false and fraudulent. (App. 8) On September 6, 1962, Gardner talked with Appellant Sohn concerning the purchase of a home. At that time he filled out a Veterans Administration Credit Statement and Offer of Prospective Purchaser, identified as Government's Exhibit 7-C. (App. 63, 64) Gardner told Sohn that he owed, at that time, "a couple of hundred dollars" to Goldblatt's Brothers, $700 balance on his car and $800 to Goldenberg's Furniture Co. on his furniture. (App. 64) The credit statement was typed as Gardner spoke. Although item 20 of that statement, calling for the names and addresses of creditors, contained the term "none," Gardner signed the statement after it was typed and handed to him.[3] He said that he did not read it carefully before signing. (App. 65, 66)

Appellant Lewis was present in the office, "either typing or asking questions," at this conversation. (App. 65) Sohn testified that Lewis had, in fact, handled the transaction. (App. 207)

Gardner was first interviewed by the F.B.I. on February 11, 1964, at which time he told the agent, "The only creditors not shown were several small bills not amounting to any more than I could pay immediately." (App. 75) When he was interviewed a second time by the F.B.I., on February 4, 1965, he told the agent that he had showed

[3] Other purchasers testified they signed blank credit statements. (See e.g., App. 98)

either Lewis or Sohn his wife's time-payment book which indicated that he and his wife owed Goldblatt's approximately two hundred dollars for the purchase of a portable TV, that he thought he showed one of the two the time-payment book on the car and said he still owed about seven hundred dollars on that, and that he told one of them that he owed seven or eight hundred dollars on his furniture.[4] (App. 76)

---

[4] The Court of Appeals held that this prior consistent statement should not have been received, but that under the circumstances its admission was not error. (App. A, *infra*, pp. 9-10).

REASONS FOR GRANTING THE WRIT

1. Denial of defendant Pace's motions to inspect the minutes of his testimony before the grand jury deprived these Petitioners of a potential witness in their behalf.

When the facts and circumstances here were brought to the attention of the United States Grand Jury for the Northern District of Illinois, in July 1955, Jerry Pace was subpoenaed to testify before that body. (App. 15) Subsequently, that Grand Jury returned Indictment No. 65 CR 555 charging Sohn, Lewis and Pace with exactly the same crimes with which they were eventually charged in the indictment under which they were eventually tried. (App. 15) Before trial (App. 1), and on the day trial commenced (App. 1, 15) Pace moved, pursuant to Rule 16, for production of the minutes of his testimony before the Grand Jury. He averred that his memory at the time (February, 1967) regarding the 1962 and 1963 events about which he had testified in 1965 was diminished and that he needed to inspect the minutes of his testimony to prepare his defense properly. (App. 15) This motion was denied. (App. 1) Unable to refresh his memory from what he had told the Grand Jury two years earlier, Pace did not take the stand as a witness in his own behalf or in behalf of Petitioners. The order of the trial court denying Pace's motion deprived Petitioners of the opportunity of having him testify in their behalf.

Rule 16(a)(3) of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides that "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect * * * recorded testimony of the defendant before a grand jury." The Advisory Committee on the Rules noted that "The Policy

which favors pretrial disclosure to a defendant of his statements to government agents also supports pretrial disclosure of his testimony before a grand jury." Title 18, U.S.C.A., 1967 Cumulative Annual Pocket Part, Rule 16, page 177. The Committee also recognized that courts have formerly required a showing of special circumstances before requiring discovery, but the overall purpose of the amendments was to liberalize discovery. See, *Walsh* v. *United States,* 1st Cir. 1967, 371 F.2d 436, 437. Accordingly, a number of District Courts have abandoned the former requirement. *United States* v. *Federman,* S.D.N.Y. 1967, 41 F.R.D. 339; see also, *United States* v. *Gleason,* S.D.N.Y. 1966, 259 F. Supp. 282; *United States* v. *Kageyama,* D.C.Ha. 252 F. Supp. 284. In *Federman* the District Court explained that, in its view, there was no need to show cause for production of statements under Rule 16(a). The Rule gives the defendant an almost automatic right to discovery, and although it does permit the District Judge some discretion, that discretion is directed to the right of the Government to show "special circumstances" why disclosure should not be made, not to the ordinary and usual right of the defendant to obtain disclosure. In *Gleason* the court explained the philosophy behind this thinking: The new Rules, enlarging defendants' right to discovery, were intended to be taken advantage of. *United States* v. *Gleason,* S.D.N.Y. 1966, 259 F.Supp. 282, 285.

The Court of Appeals for the Seventh Circuit, however, did not view Rule 16 as conferring so broad a right on defendants. The Court equated Petitioners claims as requesting application of "the liberalized rule of *United*

States v. *Amabile,* 395 F.2d 47, 53 (7th Cir. 1968), but that holding is applicable only to trials commencing after April 26, 1968." (App. A., *infra,* p. 9; footnote omitted) *Amabile,* and the authorities which prompted it (*Dennis* v. *United States,* 384 U.S. 855; *United States* v. *Youngblood,* 2nd Cir. 1967, 379 F.2d 365) deal exclusively with the right of a defendant to inspect the minutes of the grand jury testimony of a Government witness after that witness has testified on direct examination. Because the issue posed by the instant case did not rest on a claimed right to inspect prior testimony given by an adverse witness, but rather on whether Rule 16(a) was violated when the trial judge refused to grant Pace's motion to compel disclosure of *his own* grand jury testimony, the Seventh Circuit is left, in effect, without a viable decision as to the meaning of the Rule.

Lewis and Sohn were equally affected by the trial court's denial of Pace's motion. Ten transactions were introduced in support of the charges; five comprised the five substantive charges, and these five and five more comprised the overt acts charged to be in furtherance of the conspiracy. Of these ten transactions—all of which were introduced and received against all defendants—Pace alone was directly involved in four,[5] involved with Sohn in a

[5] Pace alone talked to Armstead and McClintock, whose testimony was received in support of Counts Five and Six and Overt Acts 6 and 7, respectively. Also, he alone talked to Neri (Overt Act 10) and Vicich (Overt Act 9). The jury found Lewis (along with Pace) guilty of Counts Five and Six, but the Court of Appeals reversed those convictions as to Lewis because of insufficient evidence of direct participation, and thus consciousness of guilt, by him. (App. A, *infra,* p. 9).

fifth,[6] and present during a sixth.[7] Pace's testimony was thus not only important to Pace, it was equally important to Petitioners: in this case the specific matter in controversy was whether accurate and truthful information had been conveyed to the defendants by the various purchasers and only those present at the times information was conveyed were in a position to refute the claims of the purchasers that they had conveyed truthful and accurate information. Although not as essential as the transactions in which he alone participated, Pace's testimony concerning the transactions at which he was present with the Petitioners was important to corroborate the testimony of Sohn as to what had occurred during those transactions. Especially was this true in the case involving Robert Boege (Count Four and Over Act 4) where Sohn exhibited an inability to recall the precise details of the conversation which took place four years prior to trial. (See, App. 211-212) *Cf. Dennis* v. *United States,* 384 U.S. 855.

In the Court of Appeals, Petitioners claimed and the Government conceded that Petitioners had standing to question the trial court's ruling.[8] The Court of Appeals accepted this claim and concession (App. A. *infra,* p. 8),

---

[6] Pace was present during the conversation between Boege and Sohn which formed the basis for Count Four and Overt Act 4. Both Pace and Sohn were convicted on this Count.

[7] Pace was present during the Rodriguez transaction (Overt Act 5) in which Sohn and Lewis took part.

[8] Compare, *United States* v. *Thompson,* 7th Cir. 1940, 113 F.2d 643; *United States* v. *Harris, et al.,* 7th Cir. 1967, 388 F.2d 373; *Takahashi* v. *United States,* 9th Cir. 1944, 143 F.2d 118; *Nelson* v. *United States,* D.C.Cir. 1953, 208 F.2d 504.

but, in addition to deciding that the motion was properly denied as to Pace, held that Petitioners' claim of potential benefit was "purely speculative, so that no abuse of discretion by the trial judge has been shown under Rule 16(a)(3) of the Federal Rules of Criminal Procedure." (App. A, *infra,* p. 9) Undoubtedly, Petitioners' claim was termed "speculative" because of their inability to state positively that Pace would have testified favorably. But the entire tenor of Pace's motion for the minutes reflects his need for the purpose of testifying. (App. 15) Certainly he did not want the minutes to impeach other witnesses, and, because the motion was renewed at the commencement of trial (App. 1), it was evident they were not wanted for pre-trial investigation. It can be reasonably assumed that the minutes contained favorable testimony with respect to those transactions in which Pace took part, else they would have been offered against him as admissions. And, in view of the charges and the evidence, Pace's appearance as a witness in his own behalf would have inured, unquestionably, to the benefit of Lewis and Sohn.

Under the circumstances, Petitioners' claim that such would have followed Pace's viewing his grand jury testimony is no more speculative, or less positive, than the claim that a co-defendant would exculpate another defendant—and at the same time incriminate himself—if only their respective trials were conducted separately. See *United States* v. *Echeles,* 7th Cir. 1965, 352 F.2d 892. Although the co-defendant in *Echeles* had already made statements exculpating the other defendant, there was no assurance he would *testify* in the other defendant's behalf.

If, as *Bruton* v. *United States,* ..... U.S. ....., 88 S.Ct. 1620, suggests, serious consideration is to be given toward severing co-defendants who have made statements in-

criminatory of each other, is it not equally important to the concept of a fair trial that jointly indicted defendants be given a reasonable opportunity to utilize the favorable testimony of each other? This case, then, presents an opportunity, not only to define the rights of criminal defendants under the recently revised Rule 16, but it also affords a medium whereby the rights of co-defendants might be defined.

2. Petitioners were denied the right to a speedy trial guaranteed them by the Sixth Amendment to the Constitution.

The Government initiated its investigation of the incidents which culminated in the instant indictment sometime prior to the end of October, 1963. (App. 200) The events which were being investigated all took place in 1962 or early 1963. Not until July of 1965, however, did the Government present its evidence concerning the charges to the Grand Jury. (App. 15) An indictment, No. 65 CR 555, was returned by that Grand Jury on July 29, 1965. Petitioners appeared and posted bond four days later. They were never arraigned. Thirteen months later, on August 30, 1966, the instant indictment was returned. It differed from No. 65 CR 555 in one respect only: Count I of the latter indictment, unlike the former indictment, concludes with the allegation that the conduct charged therein was in violation of Section 371, Title 18, United States Code.[9]

---

[9] This prior omission of the section of the Code allegedly violated, the Government asserted in its answer to Appellants' motion to dismiss the indictment, "necessitated" the return of the latter indictment. (App. 13) The claim is not accurate. *United States* v. *Galgano*, 2nd Cir. 1960, 281 F.2d 908; *Huizar* v. *United States*, 5th Cir. 1965, 339 F.2d 173; Rule 7(c), Fed.R.Crim. Pro., 18 U.S.C.A.

Shortly after the return of this indictment, and three months before the commencement of trial, Petitioners, reciting the foregoing, moved to dismiss the indictment pursuant to the Sixth Amendment to the Constitution and Rule 48, Federal Rules of Criminal Procedure (18 U.S.C.A.). (App. 1, 12-13) The motion was denied. (App. 1)

The Court of Appeals held that the delays prior to the last indictment were within the applicable five-year statute of limitations and, hence, were not untoward absent a showing of prejudice, a showing which, the Court felt, Petitioners did not make. (App. A, *infra*, p. 12) The Court also concluded that the delay between the last indictment and trial was not excessive and was due, in part, to defendants' pre-trial motions.

While it has been suggested that the Constitutional guarantee is, in part, essential to "limit the possibilities that long delay will impair the ability of an accused to defend himself" (*United States* v. *Ewell*, 383 U.S. 116, 120), standards have not been announced which adequately define the nature of this "impairment". Delay may be directly responsible for loss of ability on the part of defendants, or their witnesses, to recall the specific events forming the basis of the charges. See, *Frankel* v. *Woodrough*, 8th Cir. 1925, 7 F.2d 796, 799. This, in fact, was the nature of Petitioners' complaint. (App. 12) Not only was the potential testimony of their co-defendant, Jerry Pace, lost because of his inability to recall specific facts about the events in which he alone took part and the refusal of the court to order the Government to disclose to him the minutes of his grand jury testimony (see Point I), but Sohn himself was unable to recall specific conversations with various Government witnesses on occasions. (See *e.g.*, App. 211) These conversations were the essence of the case against Petitioners; either the various

purchasers were telling the truth when they said that credit information which they gave was not properly recorded on their credit applications or Sohn was telling the truth when he said he recorded all information disclosed to him.

Dennis v. *United States,* 384 U.S. 855, has recognized the disadvantage which defendants suffer when their trials take place a considerable length of time after the alleged crime, and the charges are based principally upon what was said. It should be noted that the Government usually does not suffer this same disadvantage. Their witnesses have been interviewed and have made statements, in most cases, shortly after the alleged offenses. Often these same witnesses have testified before a Grand Jury. That, at least was what happened here. (See *e.g.,* App. 74-75)

Recognizing the position in which they were placed by the long period of time which had elapsed between the alleged offenses and the return of the second indictment, Petitioners filed but one pre-trial motion—that to dismiss the indictment for failure of the Government to afford them a prompt trial. Any delay in commencing trial could hardly be attributed to such a motion. Defendant Pace filed three pre-trial motions: the first sought discovery of his grand jury testimony and documents which the Government intended to introduce at trial (R. 24); the second sought dismissal of the indictment a) by reason of an asserted violation of his Fifth Amendment rights in bringing him before the grand jury, and b) by reason of delay in bringing him to trial (R. 25-26); and the third, made and denied on the day trial commenced, renewed the request for discovery of his grand jury testimony. (R. 45-47; App. 15-16) The request for grand jury minutes was based, in main, upon Pace's diminished memory—caused by the delay in bringing him to trial.

The Record does not indicate any reason why Petitioners could not have been brought to trial in 1965, immediately following the first indictment. The statute of limitations is adequate to measure allowable delay when the Government is investigating a matter; it should not serve as a device to excuse delay when the investigation has been completed. The American Bar Association Project on Minimum Standards for Criminal Justice recommends that a view contrary to that of the Court of Appeals be taken, that is, that the time for trial should commence running from the date the charge is filed. *Standards Relating to Speedy Trial,* § 2.2(a), p. 16. Moreover, the Commentary to Section 2.3(f) of those recommendations expressly recognizes that the prosecutor should not be permitted to evade the speedy trial guarantee by the device of dismissing a charge and then filing the same charge anew. See, Commentary, *Standards Relating to Speedy Trial,* § 2.3(f), pp. 30-31. That, in effect, was what the Government accomplished here. We respectfully submit that the Court should grant its writ under its supervisory powers to examine whether the time afforded by the statute of limitations is a proper gauge by which to measure defendants' right to a speedy trial after the Government has concluded its investigation.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari be granted.

Respectfully submitted

CHARLES A. BELLOWS
Attorney for Petitioners

HARRY J. BUSCH
JASON E. BELLOWS
SHERMAN C. MAGIDSON
On the Brief.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16227
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MILTON W. LEWIS and LEE ROY SOHN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 29, 1969

Before KILEY, CUMMINGS, and KERNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In August 1966, a six-count indictment was returned against Lee Roy Sohn, Milton W. Lewis, and Jerry Pace.[1] The first count charged defendants with a conspiracy to defraud the United States concerning its right to have the transaction of the business of the Veterans' Administration "conducted free from deceit, fraud, craft, trickery, dishonesty, unlawful impairment and obstruction," in violation of Section 371 of the Criminal Code (18 U.S.C. § 371). The indictment also

[1] This indictment replaced a 1965 indictment that failed to specify in Count I the Section of the Criminal Code allegedly violated.

contained five substantive counts alleging that various defendants had violated Section 289 of the Criminal Code (18 U.S.C. § 289).

After a jury trial, each defendant was found guilty with respect to all counts in which he was charged. General sentences of one year each were imposed on defendants Sohn and Lewis, together with fines. Defendant Pace was fined and sentenced to a probationary term of two years, with the first 30 days to be spent "in a jail-type institution." Pace has not appealed.

Sufficiency of the Indictment

Defendants do not attack the conspiracy count of the indictment, which charges them under 18 U.S.C. § 371, punishing conspiracy "to commit any offense against the United States, or to defraud the United States, or any agency therof * * *."

The substantive counts charge violations of 18 U.S.C. § 289, which provides in pertinent part:

> "Whoever knowingly and willfully makes, or presents any false, fictitious or fraudulent affidavit, declaration, certificate, voucher, endorsement, or paper or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Administrator of Veterans' Affairs * * *."

Citing *Sanchez* v. *United States,* 134 F.2d 279, 282-283 (1st Cir. 1943), certiorari denied *sub nom, Tapia* v. *United States,* 319 U.S. 768, and other cases, defendants contend that this statute relates only to the subject of pension claims. The *Sanchez* case followed the Supreme Court's construction of an earlier version of this statute in *United States* v. *Keitel,* 211 U.S. 370, 395-397. In the light of the

breadth of the language of the statute, the *Keitel* and *Sanchez* cases seem restrictive in limiting it to pension claims. But we do not need to construe Section 289 here, for defendants concede that the substantive counts of this indictment properly state an offense under Section 1001 of the Criminal Code (18 U.S.C. § 1001), which provides in pertinent part:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined * * * or imprisoned * * * or both."

Sufficiency of the Evidence

Count I of the indictment is the conspiracy count and charged that defendants Lewis, Sohn and Jerry Pace conspired with three non-defendant co-conspirators[2] to defraud the United States concerning its right to have the Veterans' Administration official business conducted free from deceit and the like. In 1961 Lewis and Sohn organized Milroy Realty Company, and, after becoming licensed Veterans' Administration brokers, they operated the company as a Veterans' Administration-approved realty company selling repossessed houses owned by the Veterans' Adminstration. Pace was a salesman for Milroy. To secure approval of sales of these homes to their customers, the defendants purportedly submitted false credit information to the Veterans' Administration concerning prospec-

---

[2] Milroy Realty Company, Dominic C. Pace, and Hill's Reports, Inc.

tive purchasers upon VA Form No. 26-6705 for "Credit Statement and Offer of Prospective Purchaser." As part of the conspiracy, they allegedly obtained false credit reports from Hill's Reports, Inc. to substantiate the credit information contained on the VA forms. Eleven overt acts, including transactions with prospective customers similar to those alleged in the substantive counts, were alleged in furtherance of the conspiracy.

We conclude that there was ample testimony to prove the conspiracy charged in Count I. Much of the supporting evidence is summarized below under Counts II through IV. The falsified Veterans' Administration forms were always signed by Sohn or Lewis. Sohn himself placed false information on these statements. In the instance covered by overt act 5, prospective purchaser William Rodriguez gave correct credit information to both defendants and Lewis signed the falsified application that was filed with the Veterans' Administration. Similarly, the credit statement filed on behalf of Meddie Dampier, Jr. falsely represented that the applicant had no debts and overstated the value of some assets and listed nonexistent assets, all in contradiction to the information which the applicant had supplied to Sohn. Both defendants arranged with Hill's Reports for the speedy delivery of unchecked credit information. Through the falsified transactions, their creature, Milroy Realty Company, was enabled to receive commissions from the Veterans' Administration We are satisfied that there was more than sufficient evidence to support the jury's verdict that these two defendants engaged in the conspiracy charged, even though some of the eleven overt acts might not have involved them sufficiently to constitute separate substantive offenses.[3]

---

[3] The proof as to the transactions underlying overt acts 6 7, 9, 10 and 11 involved only Lewis or Sohn signatures on fraudulent credit statements. See the discussions of the sufficiency of the evidence under Counts V and VI *infra.*

Count I charged that in September 1962, defendants Lewis and Sohn presented to the Veterans' Administration a Credit Statement and Offer of Prospective Purchaser form signed by Theodore R. Gardner falsely representing that Gardner had no financial obligations. Like the remaining four Counts of the indictment, this was said to violate Section 289 of the Criminal Code, but defendants concede that these five Counts adequately charge a violation of Section 1001 of the Criminal Code.[4] In support of Count II, the Government introduced in evidence Milroy Realty Company's invoice, signed by Sohn, to the Veterans' Administration for $825 commission on the sale of a repossessed house to Gardner, as well as a Hill's Report showing Gardner's net worth to be $6100. The Government also introduced the Credit Statement and Offer of Prospective Purchaser form signed by Gardner on September 6, 1962, and also signed by Sohn for the Milroy Realty Company on the same date. This credit statement contained the typed answer "None" as to Gardner's creditors.

Sohn testified that Lewis handled this transaction with Gardner. He said that Gardner came to the Milroy office because Lewis had sold Gardner's brother a home. Gardner testified that he told Sohn that he owed $200 to the Goldblatt's Department Store and $700 in car payments and $800 to the Goldenberg Furniture Company. He said that the VA form was being typed out as he spoke to Sohn on September 6 at the Milroy Realty Company's office. Gardner testified that Lewis was present in the office and was typing the form or asking him questions.

Viewing the evidence in the light most favorable to the Government (*Glasser* v. *United States*, 315 U.S. 60, 80),

---

[4] See discussion supra, pp. 2-3.

the Sohn and Gardner testimony, together with the documentary evidence, sufficiently involves both Lewis and Sohn in this transaction, so that the district court correctly denied their motion for judgment of acquittal.

Count III charged that defendant Sohn presented another fraudulent Credit Statement and Offer of Prospective Purchaser to the Veterans' Administration on January 18, 1963. The form stated that another prospective purchaser, William M. Swain, "had no obligations, had $500.00 in U. S. Savings Bonds, Stocks, and other securities, had $350.00 in cash on hand and on deposit, that he owned a 1952 Super Buick hardtop worth $300.00." Swain testified that he discussed the Veterans' Administration form with Sohn and told Sohn that he had no securities. Sohn told Swain that he would list $500 in securities in order to secure Veterans' Administration approval of the house purchase. Swain said that he told Sohn he only had $200 in cash on hand, but Sohn listed the amount as $350 on the form. Swain advised Sohn that he owned a 1957 Cadillac as well as the 1952 Buick, but Sohn said that he would not list the Cadillac because Veterans' Administration approval could not be obtained if both cars were listed. Swain also told Sohn that he had $200 worth of mechanic's tools, but Sohn listed them at $1500. He also listed Swain's furniture and appliances at $5,000 even though Swain testified that he did not have such assets. Swain also told Sohn of various debts, but Sohn listed them as "None." Interestingly enough, the Hill's credit report on Swain, submitted to the Veterans' Administration by Sohn, shows Swain's net worth as $7,650, the same amount as the various assets listed on the Veterans' Administration form prepared by Sohn and executed by him and Swain.

The jury was of course entitled to credit Swain's testimony, which amply supports the charge of Count III. However, Sohn contends that since Swain actually owned a 1952 Buick worth $300, the proof did not conform to the indictment, so that there was a fatal variance within the rule of *Stirone* v. *United States,* 361 U.S. 212. But Count III charged the making of a fraudulent credit statement, and it was legitimate to prove that the statement that Swain had one car was false because he had two. See *Berger* v. *United States,* 295 U.S. 78. Count III gave adequate notice of facts to be proved. Any variance was minor, with no possibility of surprise and no danger of double prosecution.

Count IV charged that Sohn and Jerry Pace presented another false credit statement to the Veterans' Administration on January 23, 1963, involving prospective purchaser Robert G. Boege. The credit statement, which was received in evidence, showed that Boege had $150 cash on hand, whereas he testified that he had no cash on hand. It showed he had securities worth $125, while he testified that he had no securities. It listed his furniture at $5,500, but Boege testified that his furniture was not worth that amount. It showed him as the owner of a 1957 Chevrolet worth $1,000, whereas his testimony was that he owned only a 1955 Hudson. It listed him as having a life insurance policy of $10,000, but Boege stated that it was only a $5,000 policy. Finally, the statement listed his creditors as "None," although Boege testified that he had advised Sohn that he owed a loan company $700, that he owed Sears, Roebuck $500 or $600, and that he owed his credit union $200. Boege testified that he signed the Credit Statement and Offer of Prospective Purchaser in blank. The statement itself shows January 23, 1963,

as the date that Boege signed, and February 3 as the date of Sohn's signature. As with the previous Counts, there was ample testimony for the jury to base its finding that Sohn was guilty as charged in Count IV.

Although the indictment charged the credit statement falsely represented that Boege had $1,000 in life insurance, it was legitimate to show Sohn had overstated the insurance in the amount of $5,000 above the actual $5,000 insurance owned by Boege. Cf. *Berger* v. *United States,* 295 U.S. 78.

Counts V and VI charged that in March 1963, Lewis and Jerry Pace submitted fraudulent Veterans' Administration forms to that agency with respect to purchasers Edward M. Armstead and Loran A. McClintock. Our study of the evidence shows that the credit statements were fraudulent. On the other hand, Lewis' only involvement with either transaction was his purported signature on the two credit statements. Absent any testimony tending to associate Lewis with the gathering of information for these statements, that is insufficient evidence of consciousness of guilt, so that the charges against Lewis under both these Counts must be dismissed. *United States* v. *Fabric Garment Co.,* 262 F.2d 631, 640 (2d Cir. 1958), certiorari denied, 359 U.S. 989.

Non-disclosure of Pace's Grand Jury Testimony

Before and at the commencement of the trial, defendant Pace moved for production of the minutes of his July 1965 grand jury testimony in order to refresh his recollection regarding the indictment transactions. Production was refused. The Government concedes that defendants Lewis and Sohn are entitled to question this ruling.

Pace declined to testify. Lewis and Sohn assert that if Pace had been permitted to view his grand jury testi-

mony, he would have testified to their benefit. This is purely speculative, so that no abuse of discretion by the trial judge has been shown under Rule 16(a)(3) of the Federal Rules of Criminal Procedure. Moreover, defendants are in effect asking us to apply the liberalized rule of *United States* v. *Amabile,* 395 F.2d 47, 53 (7th Cir. 1968), but that holding is applicable only to trials commencing after April 26, 1968.[5]

Admission of Prior Consistent Statements

The trial court received in evidence certain 1965 FBI statements of witness Gardner after defendants attempted to impeach him through his 1964 FBI statements. The question of admitting prior consistent statements is normally one for the discretion of the trial judge. *Beaty* v. *United States,* 203 F. 2d 652, 656 (4th Cir. 1953), vacated and remanded on other grounds, 348 U.S. 905. Where, as in this case, there is doubt as to whether the impeaching statements were made or as to their scope, prior consistent statements may be admitted. *United States* v. *Corry,* 183 F.2d 155, 157 (2d Cir. 1950). It is not necessary that the consistent statement predate the inconsistent statement so long as it predates any motive to falsify testimony. *United States* v. *Keller,* 145 F.Supp. 692, 696-697 (D.N.J. 1956). Here, however, the 1965 statements were made when Gardner had a motive to fabricate in order to exculpate himself and therefore should not have been received. *United States* v. *Sherman,* 171 F.2d 619, 622 (2d Cir. 1948), certiorari denied *sub nom. Whelan* v. *United States,* 337 U.S. 931; III Wharton's Criminal Evidence (12th ed. 1955) 435-439; IV Wigmore on Evidence (3d ed. 1940) § 1126. If there were other

[5] We need not decide whether *Amabile* would apply to these facts if this trial had occurred after April 26, 1968.

cumulative errors, the harmless error rule of Rule 52(a) of the Federal Rules of Criminal Procedure might not apply. *United States* v. *Donnelly*, 179 F.2d 227, 232, 233 (7th Cir. 1950). But here, as in *United States* v. *Potash*, 118 F.2d 54, 57 (2d Cir. 1941), certiorari denied, 313 U.S. 584, the 1965 corroboration was of no great significance in the Count II case against Lewis and Sohn. We cannot say that under these circumstances the trial judge so abused his discretion in receiving this testimony as to compel reversal. *Affronti* v. *United States*, 145 F.2d 3, 7 (8th Cir. 1944). Moreover, the convictions must stand since there was evidence to support the jury's findings that they were guilty on other counts, thus justifying the one-year general sentence imposed. *United States* v. *Cephas*, 263 F.2d 518, 519 (7th Cir. 1959).

Limits on Defendant Sohn's Direct Testimony

Defendant Sohn asserts that the trial court unduly limited his direct testimony. He was not permitted to say whether Robert Boege's Veterans' Administration credit statement of January 23, 1963, allegedly filled in by Sohn and Pace, "truly and accurately represent[s] everything that was said" by Boege to Sohn on that date. We agree with the Government that Sohn was not competent to compare this credit statement with what Boege had told him, for Sohn testified that he did not recall Boege's "representations made as to his financial condition."

During the Government's case, William Swain testified that he told Sohn he had about $200 cash on hand and on deposit. The court ruled that Sohn's counsel could therefore ask Sohn whether that statement was made, thus allowing defense counsel to refute the testimony of a Government witness. The court permitted Sohn to say that Swain actually claimed to be possessed of $350

cash on hand and on deposit. Since defense counsel was permitted to make this point, there was of course no undue limitation of Sohn's direct examination. The court properly refused to let Sohn use Swain's January 18, 1963, Veteran's Administration credit statement because Sohn testified he remembered the transaction, so that it would be improper to read from the credit statement. *National Labor Relations Board* v. *Hudson Pulp & Paper Corp.*, 273 F.2d 660, 665 (5th Cir. 1960); see Annotation, 82 ALR2d 473, 493.

The court's rulings in limiting the leading questions asked of Sohn by his counsel were well within its discretion and accordingly will not be disturbed. *United States* v. *Montgomery,* 126 F.2d 151, 153 (3d Cir. 1942), certiorari denied, 316 U.S. 681; *City-Wide Trucking Corp.* v. *Ford,* 306 F.2d 805, 807 (D.C.Cir. 1962).

Testimony as to Defaults by Purchasers

Walter Budzyn, an official of the Veterans' Administration, was allowed to testify that some of the prospective purchasers approved by Milroy had defaulted, but the court ruled that their number was immaterial. The permitted colloquy was as follows:

> "Q. Of the prospective purchasers approved, have any of them defaulted?
>
> • • •
>
> The Witness: Yes."

Surely this brief reference to losses, which defendants' reply brief concedes may sometimes be the result of fraud, would not prejudice the jury against defendants.

Similarity Between Credit Statements and Hill's Reports

Mr. Budzyn was permitted to testify that "We noticed that there was a similarity between the credit state-

ment[s] [filled out and submitted by Milroy] and the Hill's Reports." This was a permissible description of voluminous documents rather than an impermissible invasion of the jury's function. *Allen* v. *Matson Navigation Co.*, 255 F.2d 273, 278 (9th Cir. 1958). It was still left to the jury to determine whether defendants had obtained false credit reports from Hill's as charged in Count I. Budzyn expressed no opinion on that subject.

Denial of Speedy Trial

Finally, defendants assert they were denied a speedy trial in derogation of the Sixth Amendment and Rule 48(b) of the Federal Rules of Criminal Procedure. The investigation of defendants' 1962-1963 activities commenced in October 1963, but the grand jury phase did not occur until July 1965, and the present indictment was not returned until August 30, 1966.[6] These delays were well within the applicable five-year statute of limitations (18 U.S.C. § 3282) and hence were not untoward absent a showing of prejudice. *United States* v. *Deloney*, 389 F.2d 324, 325 (7th Cir. 1968), certiorari denied, 391 U.S. 904. As in *United States* v. *Jones*, ... F.2d ..... (7th Cir. 1968), defendants have not satisfied us that they were prejudiced by the pre-indictment delays.

The period between indictment and trial was only five months, quite a short period in a busy metropolitan court. Some of this time was consumed by defendants' pre-trial motions. In any event, such a comparatively brief delay violates neither the Sixth Amendment nor Rule 48(b).

Defendant Lewis' conviction cannot stand under Counts V and VI. However, his conviction under Counts I and

---

[6] See note 1, *supra*.

II and defendant Sohn's conviction under Counts I, III, and IV were proper and justify the general sentence imposed. The judgment is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday January 29, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. OTTO KERNER, *Circuit Judge*

No. 16227

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs
MILTON W. LEWIS and LEE ROY SOHN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60604

Friday, February 14, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. OTTO KERNER, *Circuit Judge*

No. 16227

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs

MILTON W. LEWIS and LEE ROY SOHN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.